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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

FLETCHER KEITH ADKINSON,
Petitioner,

v.

FREDERICA ANNE ADKINSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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QUESTION PRESENTED

Whether the West Virginia courts' use of an absolute presumption in favor of the "primary caretaker" in child custody determinations violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

The Petitioner, FLETCHER KEITH ADKINSON, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Circuit Court of Jefferson County, West Virginia, entered in this proceeding on February 1, 1984.

OPINION BELOW

The Circuit Court of Jefferson County, West Virginia, entered the order on February 1, 1984, which, among

other things, awarded custody of the child of the marriage to the mother, respondent herein. The order is reprinted in Appendix A of this petition., Petitioner timely appealed to the Supreme Court of Appeals for the State of West Virginia. That Court entered an order refusing the appeal on December 11, 1984. That Order is reprinted in Appendix B of the petition.

JURISDICTION

The Order of the West Virginia Supreme Court of Appeals denying Petitioner's request for appeal was entered into on December 11, 1984. This petition is timely filed within ninety (90) days of the date of that order. Jurisdcition is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution reads in pertinent part,

> "Section one. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The state statute involved in this case is West Virginia Code §48-2-15, "Alimony; custody and maintenance of children." It is reprinted in Appendix C of this Petition.

STATEMENT OF THE CASE

This case arises in the context of a divorce and child custody proceeding in the courts of West Virginia. Petitioner and Respondent were married in 1968, and their only child, a son, was born in 1977. In 1983, both Petitioner and Respondent filed for a divorce in West Virginia and both sought sole custody of their child. Divorce and child custody proceedings were heard in the Circuit Court of Jefferson County, West Virginia, on January 27 and February 1, 1984.

During the trial, substantial evidence was presented concerning the young boy's problems in regards to confusion about his sexual identity, and sexually explicit behavior which was highly inappropriate for a boy of six years old. An expert in the field of psychology and behavioral sciences from Johns Hopkins Hospital and Medical Institutions testified that the boy suffered from an atypical gender identity disorder, and was torn between thinking he was a boy and thinking he was a girl. He also testified that the common outcome of this type of behavior demonstrated by the young boy was homosexuality, with some possibility of transsexualism. Evidence was presented that certain behavior of the mother was related to the boy's problems, that a strong male influence could be a positive aid in facilitating the boy's identification as a male, and that the father, Petitioner herein, could furnish that role model.

In his "Conclusions of Law" dealing with the custody issue, the trial judge stated that the first point always made in child custody cases is that the welfare of the child should be paramount, but that in West Virginia, the law previously awarded custody of young children to the mother. Reflecting on the case law in West Virginia supporting the role of maternal preference, the judge noted that the West

Virginia Supreme Court of Appeals had refused to find the maternal preference rule unconstitutional, and that the West Virginia Legislature had then amended the pertinent statute to specifically state that custody determinations would be made on a gender neutral manner based on the best interests of the child. (This statute is reprinted in Appendix C of the Petition). The trial judge's reflection on the response to this amendment merit attention:

> "Then we come to the great *Garska v. McCoy,* a product of Mr. Justice Neely's great legal training, imagination, foresight, and experience in raising children. Now he says that since the Legislature came along and passed that statute wiping out any maternal preference, they had to adopt a new standard, and that is who is the primary caretaker.
>
> "Well, you gentlemen, rather than have to go through those ten things* stipulated that the mother was the primary caretaker. Now the only other thing is where the primary caretaker achieves the minimum objective standard of behavior which qualifies him or her as a fit parent, the trial Court *must — not shall or may — must award the child to the primary caretaker parent.*

---

*The ten things referred to by the trial judge are the ten factors which the West Virginia Supreme Court listed in *Garksa v. McCoy,* W. Va., 278 S.Ed.2d 357, 363 (1981) as characterizing the primary caretaker. They are: 1. preparing and planning of meals; 2. bathing, grooming and dressing; 3. purchasing, cleaning and care of clothes; 4. medical care, including nursing and trips to physicians; 5. arranging for social interaction among peers after school, i.e., transporting to friends' house, for example; 6. aranging alternative care, i.e., babysitting; 7. putting the child to bed at night, attending to child in the middle of the night, waking child in the morning; 8. disciplining, teaching general manners and toilet training; 9. educating; 10. teaching elementary skills.

> Thus all of the principles enunciated in *J.B. v. A.B.* are reaffirmed except that wherever the words "mother," "maternal," or "maternal preference" are used in that case, some variation of the term "primary caretaker parent," as defined by this case should be substituted. *Just a matter of putting it on the Wang machine and deleting all reference to mother, maternal and maternal preference and we're right back to J.B. vs. A.B."* (Conclusions of Law, p. 30, emphasis added.)

The judge then ruled that custody would be awarded to the mother, with very limited visitation rights for the father.

Petitioner appealed the judgment awarding custody to the mother in a timely manner to the West Virginia Supreme Court of Appeals. In his petition, the father asserted that the absolute presumption of awarding the child to a fit primary caretaker violated both the Due Process and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The constitutional issues were again raised in oral argument in front of the Supreme Court of Appeals. That court refused the appeal on December 11, 1984.

REASONS FOR GRANTING THE WRIT

1. The Primary Caretaker Presumption, As Imposed on the Trial Courts of West Virginia By That State's Supreme Court of Appeals, Conflicts with this Court's Applicable Decisions Regarding Discrimination on the Basis of Sex.

Petitioner wishes to make it clear at the outset that he has no quarrel with the West Virginia statute which states that, "there shall be no legal presumption that, as between the natural parents, either the father or the mother should

be awarded custody of said children, but the court shall make an award of custody solely for the best interest of the children based upon the merits of each case." West Virginia Code §48-2-15 (full statute reprinted in Appendix C of the Petition). Indeed, were that the law being applied today by the courts of West Virginia, win or lose, Petitioner would not bring his cause to this Court.

Petitioner's quarrel is, instead, with the absolute presumption which the Supreme Court of Appeals of West Virginia imposed upon the trial courts of the state after passage of the gender-neutral statute; that is, an absolute presumption in favor of a fit primary caretaker parent for a child of tender years.

This Court has recently and unanimously declared that, "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti,* ____ U.S. ____, 104 S. Ct. 1879, 1882 (1984). This Court has also noted that, "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of the children he has sired and raised, [which] undeniably warrants deference, and absent a powerful countervailing interest, protection." *Weinberger v. Wisenfield,* 420 U.S. 636, 652, citing *Stanley v. Illinois,* 405 U.S. 645, 652 (1971). Further, this Court has recently affirmed that discrimination against males rather than females does not exempt or reduce this Court's scrutiny or standard of review under the Equal Protection Clause. *Mississippi University for Women v. Hogan,* 458 U.S. 718, 723 (1982).

The primary caretaker presumption raises two areas of conflict with this Court's decisions regarding discrimination under the Equal Protection Clause. The first such

area deals with the motive, purpose and intent of the West Virginia Supreme Court of Appeals in formulating and imposing the primary caretaker presumption upon the trial courts of West Virginia. This Court has made it clear that even if a law appears neutral on its face, it will fail to pass Constitutional scrutiny if it has a disproportionate adverse effect upon a certain class of people and if that impact can be traced to a discriminatory purpose or intent. *Washington v. Davis,* 426 U.S. 229 (1975). That decision made it clear that the necessary discriminatory purpose or intent need not be express, *Id.* at 241, and that the most probative evidence of intent will often be the objective evidence of what has actually happened as a result of the rule in question. *Id.* at 253, (J., Stevens, concurring).

Petitioner believes that an understanding of the West Virginia Supreme Court of Appeals' purpose and intent in formulating the primary caretaker presumption is revealed by a study of the judicial opinion upholding the constitutionality of the maternal preference presumption, the judicial opinion responding to the state legislature's amendment to the child custody statute, and the statements of the author of both of these opinions. In the first of these opinions, *J.B. v. A.B.,* 242 S.E.2d 248 (1978), the West Virginia Supreme Court of Appeals heard argument that the maternal preference presumption was unconstitutional as a violation of equal protection. The court stated then that, "there is no doubt that the presumption would withstand judicial scrutiny" even under the U.S. Supreme Court's strict scrutiny standard. *Id.* at 251-52. The court found sociological, biological and evidentiary reasons for sustaining the maternal preference presumption, *Id.* at 252, and stated that, "All exceptions to the contrary notwithstanding, families in which the traditional roles of mother and father are reversed are extraordinary, at least in West Virginia." *Id.* at 253. The court also expressed the

opinion that rational child custody decisions could not be made in individual cases, and thus, "we are clearly justified in resolving certain custody questions on the basis of prevailing cultural attitudes which give preference to the mother as custodian of young children." *Id.* at 255. The court also noted that the materal preference presumption shielded the mother from the "ominous effect" a demand for custody could have if used as a "terrorizing weapon to force unjust and inadequate settlements." *Id.* at 254, n. 4 (*See,* "The Tender Years Presumption in Child Custody Determinations: J.B. v. A.B.", 81 *West Virginia L. Rev.* 149 (1979)).

This decision was followed by a 1980 legislative amendment to the pertinent West Virginia Code, which eliminated any gender-based presumption in awarding custody. That amendent specifically directed the courts to make an award of custody "solely for the best interest of the children based upon the merits of each case." West Virginia Code §48-2-15 (1980).

In its first child custody decision after passage of the amendment described above, the West Virginia Supreme Court of Appeals expressed its unwilligness to overturn the rationale of its earlier decision and to begin basing custody decisions on the merits of each individual case. In *Garska v. McCoy,* W. Va., 278 S.E.2d 357 (1981), the West Virginia Supreme Court of Appeals acknowledged that the legislative amendment to the West Virginia child custody statute "was enacted in response to *J.B. v. A.B.*" *Id.* at 360. While still defending its "arbitrary" and "mechanical rule" of maternal preference, *Id.* at 361, the court conceded that the term "maternal preference" had been specifically overruled. Instead of following the dictates of the legislature, however, the court formulated the primary caretaker presumption and noted that in most

cases in West Virginia the primary caretaker will still be the mother, *Id.* at 360, and that the presumption will serve many of the same interests as the maternal preference presumption. *See, Id.* at 361, 362, 363. The trial judge in Petitioner's case accurately reflected this thinking in his statement that it's "just a matter of putting it on the Wang machine . . . and we're right back to the *J.B. v. A.B.*" (Conclusions of Law, p. 30).

The intent and purpose behind the formulation of the primary caretaker presumption has been made clearer by subsequent statements of the justice who authored the decision in *J.B. v. A.B.*, 242 S.E.2d 248, upholding the maternal preference presumption, and *Garksa v. McCoy*, 278 S.E.2d 357, formulating the primary caretaker presumption. That justice has stated that the list of criteria used to determine the primary caretaker "usually spells 'mother' ", and that "our rule inevitably involves some injustice to fathers." Richard Neely, *The Divorce Decision*, pp. 79-80, (1984). Indeed, the justice has criticized the "so-called 'sex-neutral' approach to custody disputes" as being harmful to the *mother*. "Justice Shares Divorce Insights," *The Evening Journal*, Martinsburg, West Virginia, November 29, 1984. The justice has stated that under the primary caretaker rule, "a mother's lawyer can tell her that if she has been the primary caretaker and is a fit parent she has *absolutely no chance* of losing custody of very young children." *The Divorce Decision, supra*, at 83 (emphasis in original). The justice also discusses his concern that custody determinations made on the merits of each individual case would place women in an unequal bargaining position with the father over alimony and child support. He further notes that in his three years of practice in West Virginia, he never represented a father who wanted custody of his children. *The Divorce Decision, supra*, p. 60.

The bias in favor of maternal preference and against fathers having custody of their children is strongly demonstrated in the opinions of the West Virginia Supreme Court and in the explanation of those opinions by their author. That bias conflicts sharply with this Court's admonition that,

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate . . ." *Mississippi University for Women v. Hogan,* 458 U.S. at 718, 724-25 (1982).

Here, although the state legislature sought to enact a gender-neutral statute, the courts have subverted that intent and imposed a presumption which was intended to and does discriminate against fathers, based largely upon "archaic and stereotypic notions" of both males and females, *Id.*

To withstand challenge under the Equal Protection Clause, this Court has often stated that a classification which discriminates between males and females must serve an important government objective and must be substantially related to those objectives. *Heckler v. Mathews,* ____ U.S. ____, 104 S. Ct. 1387 (1984), *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 150 (1980), *Craig v. Boren,* 429 U.S. 190, 197 (1976). Thus, in this case, the question must be asked: what legitimate state interest does the primary caretaker presumption promote?

Again, Petitioner starts with the premise that the West Virginia Code correctly and explicitly articulates the goal of granting custody, "based on the best interests of the child." However, the purposes of the primary caretaker presumption, as articulated by the West Virginia Supreme Court of Appeals, are quite different. They include: maintaining the basic rationale behind the maternal preference presumption which had been overturned by legislative amendment, *Garska v. McCoy,* 278 S.E.2d at 361; structuring a reliable rule upon which out-of-court bargaining can be based, *Id.* at 362; establishing certainty about custody so that the issues of alimony and support may be decided upon the merits; *Id.* at 361, and, "removing the issue of child custody from the type of acrimonious and counter-productive litigation which a procedure inviting exhaustive evidence will inevitably create . . ." *Id.* at 362. It is striking that the *only* reference by the court in the seminal opinion of *Garska v. McCoy* to the best interests of the child is the statement that, "While Code §48-2-15 [1980] speaks in terms of 'the best interest of the children' in every case, *the one enormously important function of legal rules is to inspire rational and equitable settlements in cases which never reach adversary status in court." Id.* at 361. (emphasis added).

Petitioner submits that these purposes seriously conflict with this Court's statement that the goal of awarding child custody based upon the best interest of the child is a substantial government interest. *Palmore v. Sidoti,* ____ U.S. ____, 104 S.Ct. at 1882. The rationale presented by the West Virginia Supreme Court of Appeals for the primary caretaker presumption also conflicts with this Court's determinations that concerns about administrative convenience and certainty must be subservient to the fulfillment of a more substantial state goal. *Wengler v. Druggists Mutual Ins. Cor.,* 446 U.S. 142, 152 (1980),

Frontiero v. Richardson, 411 U.S. 677, 689-90 (1973), *Reed v. Reed,* 404 U.S.71, 76-77 (1971).

2. The Primary Caretaker Presumption Formulated by the West Virginia Supreme Court of Appeals Conflicts with this Court's Application of the Due Process Clause of the Constitution in Regards to Absolute Presumptions.

This Court has traditionally been vigilant in its examination of presumptions under the Due Process Clause of the Fifth and Fourteenth Amendments. *Vlandis v. Kline,* 412 U.S. 441, 446 (1973). Many of the presumptions challenged in this Court were embodied in a statutory scheme and thus required an examination of the legislature's purpose behind the law. *Vlandis v. Kline, Id., Stanley v. Illinois,* 405 U.S. 645 (1972). In this case, however, the presumption imposed by the West Virginia Supreme Court of Appeals thwarts the direction of the state legislature to determine the custody of a child based upon the child's best interest in an individual case. Not only does the imposition of the presumption run contrary to the express intent of the legislature, it also runs afowl of the nature of the state's interest in child custody proceedings, based on its *parens patriae* power to protect those in need of protection. Redden, Kenneth, R., *Federal Regulation of Family Law,* 158 (1982). As Justice Cardozo stated, when a judge acts in a child custody case:

> "*He acts as parens patriae to do what is best for the interest of the child.* He is to put himself in the position of a 'wise, affectionate and careful parent' [cites omitted] and make provision for the child accordingly . . . He is not adjudicating a controversy between adversary parties, to compose their private differences . . . He 'interferes for the protection of infants, qua infants, by

> virtue of the prerogative which belongs to the Crown as *parens patriae'." Finlay v. Finlay,* 240 N.Y. 429, 626, 148 N.E. 624, 626 (1925) (emphasis added).

This Court has stated that at minimum, a legislative scheme based on the state's *parens patriae* power for the protection of a particular class must be "compatible with the best interests of the affected class." *O'Connor v. Donaldson,* 422 U.S. 563, 583 (1975) (Burger, C.J., concurring). In Petitioner's case, the court has imposed a presumption which is designed to serve goals other than the best interests of the affected class, and undermines the legitimate *parens patriae* goals of the state.

The primary caretaker presumption regulates the realignment of a shattered family unit by arbitrarily assigning the custody of the child. In doing so, it overlooks the child's interest in having his care, custody and control decided in a manner that it will be most likely to benefit his development, and undermines the state's legitimate interest in determining custody of a child based upon the best interests of that child. The presumption is not rationally related to the goal of achieving custody determinations in the best interests of the child. *The court never made the argument that the primary caretaker presumption was designed to fulfill the statutory direction and legitimate goal of deciding custody cases on the basis of the best interests of the child in individual cases and it could not do so.* Rather than asking which parent will take better care of the child's emotional needs, the primary caretaker presumption asks which parent has taken the clothes to the cleaners. Rather than asking how the child can best be guided and nurtured, the primary caretaker presumption looks at the *status quo* of who has planned and prepared the meals. Critically, the presumption asks who *has* been the primary caretaker during the course of the marriage,

not who *should* be the primary caretaker in the new post-dissolution or divorce arrangement. This wide gulf between a procedure designed to arrive at a custody determination in the best interests of the child and a procedure designed to ensure certainty in legal proceedings and to protect the mother's bargaining position, has severe consequences. This Court's warning in *Stanley v. Illinois* is directly on point:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interest of both parent and child. It therefore cannot stand." 405 U.S. 645, 656.

Currently, the West Virginia courts appear to be the only place in the United States where the primary caretaker presumption is imposed as, a "wooden rule . . . not serving the best interests of children." Atkinson, Jeff, "Criteria for Deciding Child Custody in the Trial and Appellate Court." 18 *Family Law Quarterly,* 1, (1984). (Mr. Atkinson is Chairperson of the Child Custody Committee, Section of Family Law, American Bar Association.)

CONCLUSION

This Court should examine the constitutional implications of this presumption, as illuminated by Petitioner's case, because it conflicts with this Court's important decisions regarding discrimination on the basis of sex and the use of absolute presumptions. The presumption subverts the true basis for the state's *parens patriae* powers and causes serious harm to the best interests of individual children. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 11 , 1985

APPENDIX A

FREDERICA ANNE ADKINSON,
Plaintiff,

vs. CIVIL ACTION NO. 83-C-430

FLETCHER KEITH ADKINSON,
Defendant.

ORDER

This 27th day of January, 1984 and 1st day of February, 1984, came the Plaintiff in person and by Counsel, Robert D. Aitcheson and the Defendant in person and by his Counsel, Richard L. Douglas upon the Plaintiff's duty verified Complaint filed in the office of the Clerk of this Court on the 4th day of November, 1983; upon service of process and a copy of the Complaint upon the Defendant, Fletcher Keith Adkinson, in person by C.R. Alt, Deputy Sheriff of Jefferson County, on the 5th day of November, 1983, according to law; upon the Defendant's duly verified answer and counterclaim against the Plaintiff filed in the office of the Clerk of this Court on the 23rd day of November, 1983; upon Plaintiff's duly verified reply to Defendant's counterclaim and upon Plaintiff's notice of final hearing served on Counsel for the Defendant on the 30th day of December 1983, upon Plaintiff's duly verified Amended Reply to Defendant's Counter-claim admitting that irreconcilable differences have arisen and do now exist between the parties and upon the other papers and proceedings formerly had and read herein, and upon the written Stipulation of Fact presented to the Court by counsel, which said Stipulation is ORDERED filed.

It appearing to the Court from the record that this cause has been regularly proceeded with according to the West Virginia Rules of Civil Procedure, the Court proceeded to

hear and did hear said cause in chambers, the same being tried independently of the admissions of either party in the pleadings, or otherwise, and at said hearing, the Plaintiff and Defendant and diverse witnesses appeared and testified under oath and in chambers, and based upon such evidence, the Court doth find that irreconcilable differences have arisen and do now exist between the parties and the Court doth further make those findings of fact and conclusions of law as are set out in its memorandum of opinion hereby ORDERED filed and made a part of the record in this civil action and said findings of fact and conclusions of law are incorporated in this order as if fully set forth herein.

Upon consideration of all of which, the Court is of the opinion that the parties are entitled to a divorce on the grounds of irreconcilable differences as set forth in the West Virginia Code, §48-2-4(10); and its is therefore ADJUDGED, ORDERED and DECREED that the marriage heretofore existing between said Frederica Anne Adkinson and Fletcher Keith Adkinson be and same is hereby dissolved and that said Fletcher Keith Adkinson and Frederica Anne Adkinson be and they are hereby divorced from each other and from the bonds of matrimony heretofore existing between them.,

It is further ADJUDGED and ORDERED as follows:

1. The Plaintiff is awarded the care, custody and control of the infant child of the parties, Frederic Keith Adkinson, born December 10, 1977, subject to the right of the Defendant to visit with the child and have the child visit with him every other weekend from 9:00 a.m. on Saturday until 6:00 p.m. on the next succeeding Sunday commencing on the weekend of February 11 and 12, 1984, and further to visit with the child and have the child visit with him during the last fifteen days of June and the last

fifteen days of July commencing in the summer of 1984, all continuing until further order of the Court, to which action of the Court the Defendant doth object and except.

2. The Defendant shall pay unto the Plaintiff commencing with the month of February, 1984, the sum of $400.00 per month for the support, maintenance and education of the minor child of the parties provided that if the Plaintiff desires that the child of the parties continue to attend the Powhatan School in Boyce, Virginia, she is to pay the child's tuition out of this monthly support, until further order of the Court, to which action of the Court, the Defendant doth object and except.

3. The Defendant shall be responsible for and shall pay for all extraordinary, reasonable and necessary medical, dental, hospital and surgical expenses incurred by or for the infant child of the parties, until further order of the Court.

4. The Plaintiff shall have the exclusive use and occupancy of the former marital home of the parties known as the Brady House in Harpers Ferry, Jefferson County, West Virginia during the minority of the child, Frederic Keith Adkinson, and the Defendant shall be responsible for and shall pay the mortgage, tax, insurance payments due for said real estate during the time of such use and occupancy by the Plaintiff and child, to which action of the Court the Defendant doth object and except.

5. The Defendant shall pay unto the Plaintiff rehabilitative alimony in the sum of $1,200.00 per month commencing with the month of February, 1984, and continuing to and including the month of January, 1989, provided that, the Plaintiff is to pay from this amount of monthly support her tuition at Hood College. The Defendant's obligation to make alimony payments to Plaintiff

shall terminate upon the first to occur of the following: (1) the remarriage of the Plaintiff; (2) the death of the Plaintiff; (3) the death of the Defendant or (4) after he makes the final payment due in January, 1989, to which action of the Court the Defendant doth object and except.

6. The Defendant is restored to the following personal property presently located in the marital domicile:

Leather Top Office Desk
Antique & Foreign Coin Collection
Two (2) Brass Bullets
Circa Revolutionary War Long Rifle
Two (2) Matched Willett Solid Maple Twin Beds
Three (3) Wagon Wheel Hub Lamps
Large Victorian Walnut Dresser with Mirror & Marble Top
Large Victorian Walnut Washstand with Mirror & Marble Top
Victorian Mahogany Rocking Chair
Oval Victorian Walnut Marble Top Table
Oblong Victorian Walnut Marble Top Table
One (1) Victorian Rosewood Straight Chair
Oval Portrait, Painted on Wood, of Gentleman with White Beard; in Antique Gold Leaf Frame
Walnut Washstand with Italian White Marble Top
Custom made Gun Rack
Antique Cast Iron Kitchen Utensils:
Small Oval Roaster with Top
Large Flat Griddle
Antique Silver Plated Coffee Urn and Tea Holder
Sterling Baby Comb, Brush and Rattle
One (1) Old Wooden Barrel
Old Wheel Barrow
Cranberry Hanging Lamp
One (1) Antique Large Red Glass Floor Urn
Ceramic Antique Umbrella Stand

Large Victorian Walnut Dresser with Miror and Rose Colored Marble Top

Victorian Dresser, White Marble Top, Hidden Lower Drawer

Marble Top Phone or Lamp Table approximately 20" x 12"

Sabre

Antique Gate Leg Table

7. The Plaintiff is restored to her own property as listed in Plaintiff's Exhibit 3 appended as a part of the record in this civil action, saving and excepting therefrom the crystal, silver and chain since there is a disagreement between the parties as to ownership of these items. All of the other furniture and furnishings in the former marital home is awarded to the Plaintiff with the consent of the Defendant and hereafter she shall have, own and enjoy said personal property as her separate property, saving and excepting therefrom the said crystal, silver and china.

8. There is no request in the pleadings for partition of the real estate but Defendant has requested that he be granted leave to amend his pleadings and there is no objection from Plaintiff, leave is granted to Defendant to amend his counterclaim within 30 days of the date of the filing of this Order with the Clerk of this Court, to seek partition of all jointly owned real estate and the silver, cystal and china (ownership of which is disputed by the parties) except that Defendant shall not seek partition of the former marital home property until the Plaintiff's right to exclusive occupancy of same ceases hereunder the former marital dwelling known as the Brady House in Harpers Ferry and to serve his amended and supplemental pleadings on Plaintiff's Counsel and all other interested parties.

It appearing to the Court that nothing further remains to be done in this matter, it is ORDERED that this civil action be retired from the docket and placed among the causes ended, except that the Court reserves the right to make such further orders concerning the support of the Plaintiff and the support, maintenance and education of the infant child of the parties as may be necessary.

The Clerk shall enter the foregoing as and for the day and date first above written.

/s/ Vance E. Sencindiver
JUDGE

A TRUE COPY
ATTEST:

ROSA W. LYNCH
CLERK, CIRCUIT COURT
JEFFESON COUNTY, W. VA.

BY /s/ Linda S. Butner
Deputy Clerk

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of December, 1984, the following order was made and entered, to-wit:

Frederica Anne Adkinson

vs. 83-C-430

Fletcher Keith Adkinson

On a former day, to-wit, September 14, 1984, came the petitioner, Frederica Ann Adkinson, by Rice, Hannis & Douglas and Richard L. Douglas, her attorneys, and presented to the Court her petition praying for an appeal from a judgment of the Circuit Court of Jefferson County rendered on the 1st day of March, 1984, with the record therein accompanying the petition, which being seen and inspected the appeal prayed for is refused by a majority of the Court. Chief Justice McHugh would grant.

A True Copy

Attest: /s/ George W. Singleton
Clerk Supreme Court of Appeals

A TRUE COPY
ATTEST:

ROSA W. LYNCH
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W. VA.

BY /s/ Pamela B. Spates
DEPUTY CLERK

NOTE: This order contains two errors. The appeal was sought by Mr. Adkinson, not Frederica Adkinson and the judgment of the Circuit Court of Jefferson County was rendered on February 1, 1984, not March 1, 1984.

APPENDIX C

§ 48-2-15. Alimony; custody and maintenance of children.

Upon ordering a divorce, the court may make such further order as it shall deem expedient, concerning the maintenance of the parties, or either of them; and upon ordering the annulment of a marriage, or a divorce, the court may make such further order as it shall deem expedient, concerning the care, custody, education and maintenance of the minor children, and may determine with which of the parents or other proper person or persons the children or any of them, may remain; and the court may, from time to time afterward, on the verified petition of either of the parties, revise or alter such order concerning the maintenance of the parties, or either of them, and make a new order concerning the same, as the altered circumstances or needs of the parties may render necessary to meet the ends of justice; and the court may also from time to time afterward, on the veried petition of either of the parties or other proper person having actual or legal custody of such child or children, revise or alter such order concerning the care, custody, education and maintenance of the children, and make a new order concerning the same, as the circumstances of the parents or other proper person or persons and the benefit of the children may require. In making any such order respecting custody of minor children, there shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of said children, but the court shall make an award of custody solely for the best interest of the children based upon the merits of each case. In any case where the divorce or the annulment is denied, if the parties are living separate and apart from each other, the court shall retain jurisdiction of the case for the purpose of determining with which of the

parents or other proper person or persons the children or any of them may remain and of making such order concerning the care, custody, education and maintenance of the minor children, or any of them, as to the court may seem proper and the benefit of the child or children may require; and such order may, from time to time afterward, on verified petition of either of the parties or other proper person having actual or legal custody of such child or children, be revised or altered, and a new order made, as the circumstances of the parties or the needs of the children may require. For the purpose of making effectual any order provided for in this section the court may make any order concerning the estate of the parties, or either of them, as it shall deem expedient.

In any case where a divorce is granted in this State upon constructive service of process, and personal jurisdiction is thereafter obtained of the defendant in such case, the court may make such further order as it shall deem expedient, concerning the maintenance of the parties, or either of them, or concerning the care, custody, education and maintenance of the minor children, and in any case where an annulment is granted in this State upon constructive service of process, and personal jurisdiction is thereafter obtained of the defendant in such case, the court may make such further order as it shall deem expedient concerning the care, custody, education and maintenance of the minor children.

Upon ordering the annulment of a marriage or a divorce, the court may, in its discretion, make such further order as it shall deem expedient, concerning the grant of reasonable visitation rights to any grandparent of the minor children upon application, if the grandparent or grandparents are related to such minor child through a party to such action whose whereabouts are unknown or

through a party who did not answer or otherwise appear and defend the cause of action in which such divorce or annulment is granted, and the court may issue any necessary order to enforce such order or decree. (Code 1849, c. 109, § 12; Code 1860 c. 109, § 12; Code 1868, c. 64, § 11; 1882, c. 60, § 11; Code 1923, c. 64, § 11; 1935, c. 35; 1953, c. 70; 1969, c. 49; 1980, c. 24.)

Office-Supreme Court, U.S.
FILED
MAY 3 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLETCHER KEITH ADKINSON,
Petitioner,

v.

FREDERICA ANNE ADKINSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1435

FLETCHER KEITH ADKINSON,
Petitioner,

v.

FREDERICA ANNE ADKINSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioner correctly states that this case arises in the context of a divorce and child custody proceeding in the Courts of West Virginia, that Petitioner and Respondent were married in 1968 and that a child was born to the Petitioner and Respondent in 1977. In this divorce and custody proceeding both parties sought sole custody of their son, and both parties offered expert testimony at the trial concerning the son's alleged confusion about his sexual identity. It is also true that

one of the Petitioner's experts testified that the boy suffered from an atypical gender identity disorder. The expert testifying on the behalf of the Respondent testified that the son did show some confusion on matters of sexuality, but did not suffer from the said disorder. In short, the evidence was in conflict. Evidence was also offered that the Respondent was a fit parent to have custody of the son, and that the confusion suffered by the son as to his sexuality could have resulted from the prolonged absence of his father from the marital home, even prior to the separation of the parties. After hearing two (2) days of testimony from approximately twenty (20) witnesses, the trial judge determined that the Respondent was a fit parent and should have the custody of the child. The parties had previously stipulated that the Respondent was the primary caretaker of the son prior to the separation of the Petitioner and Respondent.

REASONS FOR DENYING THE WRIT

1. The Primary Caretaker Presumption, as Imposed on the Trial Courts of West Virginia by the West Virginia Supreme Court of Appeals, Does Not Conflict With This Court's Applicable Decisions Regarding Discrimination on the Basis of Sex.

This Court has stated that, "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of the children he has sired and raised [which] undeniably warrants deference, and absent a powerful countervailing interest, protection." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 652 (1975) citing *Stanley* v. *Illinois,* 405 U.S. 645, 651 (1971). Respondent agrees with and supports that statement. Further, Respondent believes

that West Virginia's Primary Caretaker Rule provides the protection intended by that statement. Respondent asserts that an examination of *Garska* v. *McCoy,* W.Va. 278 S.E.2d 357 (1981) in light of *Stanley* v. *Illinois, supra,* will reveal the same.

In *Stanley* v. *Illinois,* the State of Illinois removed illegitimate children from the custody of their father on the sole basis that the father and mother of the children were not married. The mother had died and pursuant to Illinois law, the mother's illegitimate children became wards of the State. No hearing was granted the father of the children to determine if the father were a fit parent. Indeed, Illinois law *presumed* an illegitimate father was an *unfit* parent, and in fact did not include the unwed natural father of illegitimate children within the definition of "parents". Ill. Rev. Stat., c. 37, § 701-14. The question before this Court was, "Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?", to which the Court responded, yes. *Stanley* v. *Illinois, supra,* at 649. The presumption before this Court in the instant case is not "constitutionally repugnant".

In West Virginia, a trial court must award custody of children of tender years to the primary caretaker parent, if he or she is a fit parent. *Garska* v. *McCoy, supra,* at 363, regardless of the sex of that parent, Id. at 362. Fitness is defined as being emotionally supportive, providing routine cleanliness, preparing nourishing food or otherwise demonstrating fitness. *J.B.* v. *A.B.,* W. Va. 242 S.E.2d 248, 253 (1978). In such a custody proceeding, both parents are given the opportunity to present evidence that he or she was the primary caretaker of the child prior to the separation of the parties. Additionally, each party is afforded the

opportunity to prove his or her fitness and prove that the other parent is not fit. To determine which parent is the primary caretaker the Court must consider at least the following:

1. Preparing and planning of meals;
2. Bathing, grooming and dressing;
3. Purchasing, cleaning and care of clothes;
4. Medical care, including nursing and trips to physicians;
5. Arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
6. Arranging alternative care, i.e. babysitting, day-care, etc.;
7. Putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
8. Disciplining, i.e. teaching general manners and toilet training;
9. Educating, i.e. religious, cultural, social, etc.;
10. Teaching elementary skills, i.e., reading, writing and arithmetic.

Garska v. *McCoy, supra,* at 363.

The West Virginia court noted that the primary caretaker in this State will most often be the mother, but that given recent continuing changes in society, a father may also prove to fulfill that role. Id. at 360. Thus, the primary caretaker presumption is indeed sex neutral and *does not discriminate* against the Peti-

tioner or anyone. Unlike *Stanley* v. *Illinois, supra,* where there was an absolute statutory presumption that *all* unmarried fathers were unsuitable and neglectful parents, there is no such absolute presumption in West Virginia that a father could not be a primary caretaker, nor is there a presumption that a father is not a fit parent. As the presumption is not discriminatory, the Petition should be denied.

Assuming *arguendo,* that the primary caretaker presumption is discriminatory, does it serve an important governmental objective(s) and is it substantially related to that objective(s). *Craig* v. *Boren,* 429 U.S. 190, 197 (1976). The governmental objective in child custody cases in West Virginia is to determine what is in the best interest of the child. West Virginia Code, § 48-2-15 [1980]. To accomplish that objective the West Virginia Supreme Court of Appeals established the primary caretaker rule for children of tender years. Is that presumption substantially related to the above stated governmental interest? Respondent believes it is.

In *Garska* v. *McCoy, supra,* several reasons were given for the adoption of the presumption at issue. First, the Court noted that the primary caretaker is usually in an inferior financial position to the other parent and that too often the financially superior parent uses a potential custody fight to bargain down child support payments. *Garska* v. *McCoy,* Id. at p. 360. The best interests of the child could not possibly be served by allowing custody to be used to reduce support payments. Thus, the primary caretaker rule is an attempt to put some certainty in custody proceedings and thereby not grant the financially superior parent

an unfair advantage. Id. at 360-361. Also, trial courts are often not able to discern which parent is the more fit, given the fact that most judges are not trained psychologists. Id. at 361-362. Finally, the court noted that as the State Legislature had provided statutory means to simplify divorce proceedings and in turn settle related matters out of court, it was necessary to provide some guidelines and certainty of outcome to protect the parent who may be in an inferior bargaining position. Id. at 362. As the court noted, "custody fights are highly destructive to the emotional health of children." *Garska* v. *McCoy,* Id. at 361. Respondent agrees and submits to this Court that the above stated reasons sustain the rule in question from constitutional attack.

However, the West Virginia court did not stop with the above. It articulated a minimum of ten criteria to be used to determine which parent was the primary caretaker. Id. at 363. At pages 13 and 14 of his Petition, Petitioner argues that the rule and the criteria do not consider what is in the best interest of the child prospectively, but dwell on the past, thus deciding custody in a manner that will not most likely benefit the child's further development. Respondent's answer is that the past is often the best indication of what the future may hold.

The West Virginia court agreed when it said that the primary caretaker rule provides a "track record" to evaluate, and that educational and economic position "pale in comparison to love, affection, concern, tolerance and willingness to sacrifice—factors about which conclusions can be made for the future most intelligently upon a course of conduct in the past." Id. at

364. It is important to note that at pages 200-201 of Volume II of the record below the trial court noted that: "It was not until the imminency of the filing of the divorce complaint that he [the Petitioner] took the child to psychologists getting ready to take his case to Court perhaps. Prior to that very little evidence of any interest at all in the father—of the father in the *welfare* of the child, very little." Emphasis added.

Respondent asserts that the case before this Court is an example of how the past is an indication of the future and indicates that, indeed, the rule granting custody to the primary caretaker and fit parent of a child of tender years is substantially related to the legitimate governmental interest of acting in the best interest of the child. For West Virginia cases stating that the best interest of the child are the primary consideration in child support matters, Respondent directs this Court to *Murredu* v. *Murredu,* 160 W.Va. 610 (1977), and *Allen* v. *Allen,* W.Va. 320 S.E.2d 112 (1984).

Interestingly enough in dissenting to the majority opinion in *Allen* v. *Allen,* Id. Justice Neely the author of *Garska* v. *McCoy, supra,* and the Judge whom is so frequently cited by the Petitioner, stated "although I strongly favor our primary caretaker-parent presumption, I do not read that presumption as providing that mothers will invariably get custody." *Allen* v. *Allen, supra,* at 118. In *Allen* v. *Allen,* Id. Justice Neely would have granted the father custody as in his opinion the father was the primary caretaker.

The case is clearly not a situation where "the State spites its own articulated goals" when custody is granted to a primary caretaker. *Stanley* v. *Illinois,*

supra, at 652. The articulated goal of the State of West Virginia is to award custody of children in a manner that is in the best interests of the children. The primary caretaker rule is a legitimate, rational and reasonable and substantially related means of accomplishing that goal.

2. The Primary Caretaker Presumption Formulated by the West Virginia Supreme Court of Appeals Does Not Conflict With This Court's Application of the Due Process Clause of the Constitution.

Again, Respondent believes that an examination of the instant case in light of *Stanley* v. *Illinois, supra,* indicates that Petitioner's assertion is without merit.

As Petitioner, citing *Stanley* v. *Illinois,* noted at page 14 of his petition:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interest of both parent and child. 405 U.S. 645, 656.

As has been discussed earlier, in *Stanley* v. *Illinois,* there was an absolute statutory presumption that all unwed fathers were unfit parents and as such were not afforded an opportunity to prove their fitness. In this case, the presumption is that a primary caretaker who is a fit parent must be granted custody of a child of tender years. However, in West Virginia, each parent is afforded the opportunity to prove that he or she was the primary caretaker prior to separation and

is a fit parent. There is *no* presumption of any kind that one parent or the other should have custody.

Additionally, while the ten criteria for determining which parent should be granted custody set out in *Garska* v. *McCoy, supra,* look to the past in an attempt to ascertain the future, the trial court is not prohibited from examining other pertinent criteria. All that is required of the trial court is that the court *initially* consider those ten items. Id. at 363. Then, the court can consider any number of things in determining what is in the best interest of the child. The "present reality" in West Virginia and in most states is that the mother is the primary caretaker of infant children and that she is most always a fit parent. Consequently, it is most often the mother who will be awarded custody.

That the Petitioner was not afforded due process is a ludicrous assertion. The record in this case consists of over 400 pages. Twenty witnesses testified; nine (including Petitioner) on behalf of Petitioner. The hearing lasted two days. All this occurred *after* the parties had stipulated that the Respondent was the primary caretaker of the child. As stated earlier, upon the conclusion of the hearing the trial judge found that prior to the divorce proceeding, *very little* evidence existed as to Petitioner's concern for the *welfare* of the child. This Court has long held that a party who seeks and is given the opportunity in State court to litigate rights claimed by him cannot have the judgment reviewed in this Court on the grounds that his constitutional rights were denied because the litigation did not result successfully. *Remington Paper Co.* v. *Watson,* 173 U.S. 443, 451 (1899).

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The primary caretaker rule as applied in West Virginia does not conflict with this Court's decision regarding sex discrimination. There is no discrimination. Even if the rule does discriminate against the Petitioner, such discrimination is substantially related to the important governmental interest of acting in the best interest of a child of tender years. Further, the Petitioner had a full and fair hearing. He cannot now claim due process.

Respectfully submitted,

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